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Supreme Court, U.S.
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No. 04-641

IN THE

Supreme Court of the United States

COUNTY OF DUPAGE, a body politic and corporate,

Petitioner

v.

PALMETTO PROPERTIES, INC., an Illinois corporation and GREGORY A. SCHIRMER

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court properly awarded Palmetto attorneys' fees as a "prevailing party" where a) the court entered partial summary judgment invalidating an adult business use separation requirement, b) the County subsequently amended that requirement so that it did not apply to Palmetto, c) Palmetto then opened its adult entertainment cabaret at its chosen location, and d) the trial court thereafter dismissed the case as moot?

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, the Respondents state that Palmetto Properties, Inc. does not have a parent corporation and that no publicly held company holds 10 % or more of its stock. Gregory A. Schirmer is a natural person.

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STATEMENT OF THE CASE

In light of this Court's Rules 15.3 and 24.2, the Respondents, Palmetto Properties, Inc. and Gregory A. Schirmer (collectively "Palmetto"), will forego a comprehensive statement of the case. The Court of Appeals' decision below undertook a "meticulous analysis" of the proceedings, Ptn. App. 2, and its "Background" discussion fairly completely describes the litigation in the trial court, Ptn. App. 2-8. The Statement of the case by the Petitioner County of DuPage ("County"), Ptn. 5-7, however, requires amplification or correction in three respects.[1]

First, Palmetto's constitutional challenges included a prior restraint attack, *cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223, 238 (1990); *Thomas v. Chicago Park District*, 534 U.S. 316, 322 n. 2 (2002), on the County's procedures (and the substantive standards governing them) for processing a request for special or conditional zoning use approval, which was specifically required of prospective "adult business uses," such as Palmetto, which sought to locate in light – as opposed to heavy – industrial districts. Ptn. App. 6 n.5. The trial court denied the County's motion to dismiss that challenge, but it later failed to reach that challenge in its partial summary judgment of March 29, 2001. Ptn. App. 8 n. 7, 30. That failure – apparently based upon a misapprehension that the prior approval requirement would not apply once the

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[1] The County's recitation of Relevant Provisions Involved, Ptn. 1-5, also requires amplification in one technical respect. This Court has generally understood the Fourteenth Amendment's Due Process Clause, not the Privileges and Immunities Clause, as the vehicle of incorporation against state and local governments of protections such as that of the First Amendment's Free Speech Clause. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); *Fiske v. Kansas*, 274 U.S. 380, 387 (1927). The Due Process Clause reads ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

challenged separation requirement had been invalidated, *see* Ptn. App. 34-35 – was the primary reason why the partial summary judgment did not itself become a final judgment. After the partial summary judgment, the County repealed the requirement that prospective adult business uses obtain prior special or conditional zoning use approval, so that issue, too, was rendered moot. The presence of the prior restraint challenge explains why the March 29, 2001 order did not amount to a final judgment. Beyond that, though, the prior restraint challenge is "largely tangential" here, as the Court of Appeals properly recognized. Ptn. App. 6 n. 5.

Second, and more important, it is at best a serious understatement to assert, as the County repeatedly does, Ptn. 5, 11, 14, that the County's zoning ordinance, as amended in 1998, merely "incorporated" the provisions of the Illinois statute promulgated earlier that year. The County concedes that its own zoning ordinance expressly forbade adult business uses from locating within 1000 feet of any portion of a forest preserve. Ptn. 4-5. The Court of Appeals correctly characterized the ordinance as "mirror[ing]" the state statute, Ptn. App. 4, as indeed the County occasionally does as well, Ptn. at 11.

Finally, the County fails to make it clear that the trial court refused to reach the merits of Palmetto's challenge to the state statute (which, as the Court of Appeals recognized, Ptn. App. 6, was identical in all respects to the challenge to the invalidated ordinance provision) only because no Defendant sought to enforce or defend the statute below. Ptn. App. 24. Indeed neither the Attorney General, the State's Attorney, the Forest Preserve District, nor, for that matter, anyone else *ever* attempted to enforce the state statute against Palmetto. In fact, Palmetto located, opened, and has long operated its adult entertainment cabaret at its chosen location without limitation under the

statute. Since the statute regulates only the initial location, not the continuing operation, of an "adult entertainment facility," Ptn. 3, the doctrine of latches, as well as that of judicial estoppel, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), now precludes its assertion against Palmetto.

REASONS FOR DENYING THE PETITION

I. The Award of Attorneys' Fees Is Proper Under *Buckhannon* Because the Trial Court's Partial Summary Judgment Altered the Legal Relationship Between the Parties and Placed a Judicial *Imprimatur* upon the Ordinance Amendment Which Was Necessary to Moot the Case Below.

Until the trial court granted Palmetto partial summary judgment on March 29, 2001, the County took the position that its zoning ordinance *alone* prohibited Palmetto from ever opening its adult entertainment cabaret at its chosen location. *See* Ptn. App. 26. The trial court's partial summary judgment established that the County's position was wrong. Ptn. App. 29-30, 33-35. Rather than appeal that decision, the County decided to moot the case by amending the challenged ordinance provisions so they no longer applied to Palmetto at all. Ptn. App. 8, 14. As the County was in the process of doing so, Palmetto completed the construction of its building, and it promptly opened its adult entertainment cabaret at its chosen location. It has been operating that cabaret ever since. After Palmetto thus located and opened its adult entertainment cabaret, the trial court formally dismissed the case as moot. Ptn. App. 8.

Under these circumstances, the trial court subsequently determined that Palmetto was a prevailing party, within

the meaning of Section 1988, on its challenge to the ordinance's requirement that adult business uses separate by at least 1000 feet from all portions of a forest preserve. It thus awarded to Palmetto its reasonable attorneys' fees, *see* 42 U.S.C. § 1988, carefully limited to compensating for the time necessarily spent on challenging the ordinance separation requirement. Ptn. App. 8. Both courts below had no trouble recognizing two things. First, the relevant legal relationship between the parties changed at the time of the partial summary judgment, not when the county eventually got around to amending its already-invalid ordinance provision. Second, it was indeed the partial summary judgment – rather than Palmetto's challenge alone – which prompted the County to stop defending its position and change it instead. Ptn. App. 14-15, 39. In this case there was thus both a "judicially sanctioned change in the legal relationship of the parties" and "the necessary judicial *imprimatur* on the change" made to the challenged ordinance. This Court took care to note that both were absent in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 605 (2001). The instant attorney's fees award was thus perfectly proper under *Buckhannon*. The County has altogether failed to suggest any disagreement at all among lower courts on this score. *Cf.* S. Ct. Rule 10(a).

The County does complain about two things. First, it suggests that an attorneys' fees award is always inappropriate whenever the final, formal result is a mootness dismissal. Not only would this raise pure form high over substance, it would create perverse and seriously inefficient litigation incentives, as the Court of Appeals quite properly recognized below. Ptn. App. 15-16. In this case, for instance, Palmetto could have pressed for prompt consideration of its prior restraint challenge. Instead, it "graciously," Ptn. App. 16, allowed the County time to

repeal the challenged provisions requiring specific prior approval for each prospective adult use in a light industrial zone, deliberately foregoing compensation for the attorneys' fees generated by the prior restraint challenge. Palmetto should not be further penalized for adopting this much more efficient litigation course. The decisions below leave government defendants free to avoid attorneys' fees awards by setting themselves up as constitutional moving targets, provided only that they make their moves *before*, rather than after, a court enters a substantive ruling against their initial position.

Second, the County suggests that, since the original impetus for its forest preserve separation requirement arose from an amendment to a state statute, the State of Illinois, rather than the County of DuPage, should answer for any attorneys' fees which may be due to Palmetto. The County never even begins to explain how its current suggestion is consistent with the litigation choices it adopted below. Neither the County nor anyone else sought to enforce or defend the state statute at all in the trial court. They altogether abandoned the statute before the trial court. In contrast, the County actively defended the separation requirement which *its ordinance* imposed between adult business uses and all portions of forest preserves. For this reason, this case simply does not present the question of which government entity should pay a fee award when, for instance, a County State's Attorney unsuccessfully defends a challenged state statute. *Cf.* Ptn. 10, *citing Echols v. Parker*, 909 F.2d 895 (5th Cir. 1990). At times, the County speaks as if state law somehow constrained it to affirmatively amend its zoning ordinance in 1998. But any such suggestion is flatly inconsistent with the County's own position that it was free to formally moot this litigation by *abandoning* the 1000-foot separation requirement which its ordinance imposed between adult business uses and all

portions of a forest preserve. The County simply cannot have it both ways.

Both the trial court and the unanimous Seventh Circuit panel were correct in concluding that Palmetto was a "prevailing party" under Section 1988. No court has suggested otherwise of any similarly situated plaintiff. *Cf.* S. Ct. Rule 10(a). There is no good reason to issue a writ of certiorari in this case.

II. The Merits of Palmetto's Challenges to the Adult Use Separation Requirements Are Not Before this Court Since No Party Sought to Enforce or Defend the State Statute Below and Since the County Amended its Ordinance Provision Rather than Appeal from the Trial Court's Decision Invalidating It.

This Court's Rule 15.2 expressly admonishes respondent's counsel "that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition" "that bears on what issues properly would be before the Court if certiorari were granted." It is primarily for this reason that Palmetto files the instant opposition. *Cf.* S. Ct. Rules 15.1, 15.4.

The County spends much of its discussion of its Reasons for Granting the Writ commenting on matters which were either not decided by the trial court or not timely appealed to the Court of Appeals. Ptn. 8-12, 13-14. These matters cannot properly be brought here on a writ of certiorari, even though the County is correct in asserting this Court's

jurisdiction to review the attorneys fees award itself under Section 1254(1) of Title 28 of the United States Code.[2]

In particular, the County argues at some length, Ptn. 8-9, as if a question concerning the validity of the Illinois statute regulating the location of adult entertainment facilities is properly before this Court. *E.g.* Ptn. 9 ("no sound basis to invalidate a state law on First Amendment grounds merely because . . .") It is not. No Defendant below sought to enforce or defend that statute in the trial court, and no one, in fact, ever attempted to assert that statute against Palmetto. For that reason, the trial court dismissed all challenges to the statute *without* reaching the merits. Ptn. App. 7 n. 6, 23-25. No party appealed from the trial court's disposition of Palmetto's challenge to the statute. It was thus never before the Court of Appeals, and it cannot come here on review by writ of certiorari.

In addition, the County argues as if the validity of its own ordinance provisions – or at least *some* countywide or broader adult use zoning provisions – were in question at this juncture. Again, they are not. In this case, the trial court struck down one provision of the County's zoning ordinance as amended in 1998. The County then further amended it to eliminate any case or controversy over it between Palmetto and anyone else. This case then, predictably enough, came to an end (on the merits) after Palmetto opened its adult entertainment cabaret at its chosen location. No doubt many interesting questions would have arisen if the Defendants below had bothered to enforce or defend the state statue below. *See, e.g., Township of Saddle Brook v. A.B. Family Center, Inc.*, 156 N.J.

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[2] Palmetto agrees that this Court has jurisdiction in this case to entertain the Question Presented *as stated* in this Opposition at i. For the reasons presented at 1-6, of course, Palmetto respectfully submits that it should not do so.

587, 596-97, 722 A.2d 530, 535 (1999)("relevant market area"). But because they did not – and *only* because they did not – no record was made below concerning these interesting issues. While this Court may some day need to resolve such issues, it should not attempt to do so now on a silent record. Indeed, it presently lacks the jurisdiction to do so.

CONCLUSION

For all of the foregoing reason, this Court should deny the instant petition in its entirety. For the jurisdictional reasons set forth at 6-8, *supra*, it should deny review on any of the Questions Presented by the Petitioner but should, at most, grant review limited to the Question Presented here by the Respondents.

Respectfully submitted,

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